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Foreword

Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers

BRUCE A. GREEN*

INTRODUCTION

This issue and a companion issue of the *Hastings Constitutional Law Quarterly*¹ together collect sixteen papers on the professional conduct of prosecutors and criminal defense lawyers. Typically, normative scholarship on lawyers' professional conduct focuses on what the ethics rules and other laws require, or should require, of lawyers. These pieces are different, because their principal focus is not on whether lawyers' conduct is minimally ethical or lawful, but on how lawyers should practice within the bounds of the ethics rules and other law. That is because the authors were asked to take unenforceable professional standards, the ABA Criminal Justice Standards for Prosecution and Defense Functions,² as their point of departure.

The ABA is now in the middle of the multiyear process of revising these two sets of Standards, as Professor Rory Little, reporter to the drafting committee, discusses in his preface to the companion issue.³ The sixteen papers examine aspects of the 2009 and 2010 draft revisions. The two sets of draft revisions with which the authors worked are subject to change and, by the time this Foreword is published, may already have been slightly rewritten. But the objective was not to critique the particular language of the provisions so much as to use them as a springboard for thinking conceptually about how prosecutors and

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1. Symposium, 38 HASTINGS CONST. L.Q. 747 (2011).

2. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

3. Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747 (2011); see also Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159 (2011); Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10, 13.

defense lawyers should conduct their work and how professional standards should advise them.

The subjects of these papers vary. Some address conduct in which both prosecutors and defense lawyers might engage: communicating with and preparing witnesses,⁴ commenting publicly about pending cases,⁵ negotiating waiver agreements,⁶ and delivering summations.⁷ Others address cross-cutting professional obligations: candor,⁸ civility,⁹ conflicts of interest,¹⁰ and confidentiality.¹¹ Some pieces address problems particular to criminal defense lawyers: excessive public defender workloads,¹² the possibility of revealing client confidences to rectify a wrongful conviction,¹³ what to do with physical evidence of a crime,¹⁴ and how to function in problem-solving courts.¹⁵ Others address problems particular to prosecutors: for example, their exercise of charging power¹⁶ and disclosure obligations.¹⁷

The sixteen papers arise out of a larger project originated and developed by the ABA Criminal Justice Section, which I have had the privilege of chairing in 2010–2011. Drafts of these pieces were produced in the summer of 2010 to inform a series of discussions among prosecutors, defense lawyers, judges, and academics that were conducted at law schools across the country in the fall of that year. The overarching

4. See Roberta K. Flowers, *Witness Preparation: Regulating the Profession's "Dirty Little Secret"*, 38 HASTINGS CONST. L.Q. 1007 (2011); Melanie D. Wilson, *Quieting Cognitive Bias with Standards for Witness Communications*, 62 HASTINGS L.J. 1227 (2011).

5. See Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285 (2011).

6. See Jane Campbell Moriarty & Marisa Main, "Waiving" Goodbye: *Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029 (2011).

7. See Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards That Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915 (2011).

8. See Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation, and Civility in Relationships Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845 (2011); Kevin C. McMunigal, *Investigative Deceit*, 62 HASTINGS L.J. 1377 (2011).

9. See Griffin & Caplow, *supra* note 8.

10. See Laurie L. Levenson, *Conflicts over Conflicts: Challenges in Redrafting the ABA Standards for Criminal Justice on Conflicts of Interest*, 38 HASTINGS CONST. L.Q. 879 (2011).

11. See Cecelia Klingele, *Confidentiality and Disclosure: What the New ABA Criminal Justice Standards (Don't) Say About the Duties of Defense Counsel*, 38 HASTINGS CONST. L.Q. 983 (2011).

12. See Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949 (2011).

13. See James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811 (2011).

14. See Rodney J. Uphoff, *The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?*, 62 HASTINGS L.J. 1177 (2011).

15. See Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349 (2011).

16. See Bennett L. Gershman, *Prosecutorial Decisionmaking in the Charging Function*, 62 HASTINGS L.J. 1259 (2011).

17. See Ellen Yaroshfsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321 (2011).

objective of the project was to contribute to a dialogue within, and between, the legal profession and academia on questions of professional conduct in the criminal context, with the hope of promoting both better understandings and better practices.

This Foreword begins by offering some thoughts on the nature of the questions of professional conduct encountered by prosecutors and defense lawyers and the value of developing sets of national standards like the Criminal Justice Standards for Prosecution and Defense Functions to offer these lawyers guidance. It then describes the project that led to the development of the articles collected by the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* and its objectives, and offers some reflections on the value of viewing individual Standards in relation to the underlying law, to lawyers' differing roles, and to each other. It concludes with thanks to the authors and others who participated in this project.

I. THE IMPORTANCE OF ARTICULATING NATIONAL STANDARDS ON THE CONDUCT OF PROSECUTORS AND DEFENSE LAWYERS

For the most part, the daily conduct of prosecutors and defense lawyers is not dictated by ethics rules or other law, although the law may establish limits or a framework within which these lawyers operate. For prosecutors and defense lawyers, as for lawyers generally, professional conduct and decisionmaking are mostly matters of professional judgment, experience, and discretion.¹⁸ There are no rule books or instruction manuals for most of what these lawyers do. Even so, there is room for debate about how best to act, even with respect to many routine and recurring matters.

Consider the ordinary work of prosecutors. Prosecutors make daily decisions about whether to initiate criminal charges.¹⁹ How certain should the prosecutor be that the defendant is guilty before bringing or prosecuting charges? As a legal matter, charges may be filed as long as there is "probable cause."²⁰ But for a prosecutor seeking to exercise authority prudently and fairly, is "probable cause" enough? Or should the prosecutor refrain from bringing charges unless she is more certain of the defendant's guilt? Prosecutors regularly interact with crime victims and other witnesses in the course of investigations and trial preparation.²¹ May prosecutors advise witnesses that they have no obligation to meet with defense counsel? Doing so may spare the witnesses inconvenience and possible physical risk, but may also impede the defense counsel's

18. See Levenson, *supra* note 10, at 879 ("Rules are fine, but they will never take the place of good judgment and a commitment to justice.").

19. See generally Gershman, *supra* note 16.

20. See MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2010).

21. See generally Wilson, *supra* note 4.

ability to conduct an effective investigation that may be necessary to provide good advice and to ensure a fair trial.

Likewise, consider the ordinary work of defense lawyers. Every day, they meet new clients, introduce themselves and establish the terms of the lawyer-client relationship. Ethics rules and the attorney-client privilege guarantee that what the client discloses will ordinarily be kept confidential, but there are exceptions.²² Sometimes the lawyer may or must disclose what a client has said.²³ Should defense lawyers simply promise that what the client says will be kept confidential, even though exceptions may conceivably apply later, or should they also explain the exceptions in general terms, or even in detail, at the risk of undermining the client's trust and discouraging the client's willingness to be forthcoming?²⁴ Defense lawyers interview their clients and witnesses to learn information relevant to the representation, subject to the modest legal limitation that they may not intentionally induce a client or witness to lie.²⁵ May defense lawyers employ interviewing techniques that create a high risk of eliciting false testimony? For example, may they give clients and witnesses an understanding of the relevant law and legal theories, even if doing so may influence clients and witnesses to tailor their accounts?²⁶

Experienced lawyers may not worry over recurring questions such as these. They may find guidance in office policy, take their cues from the conduct of those around them,²⁷ or develop personal practices that, over time, become rote. But even experienced lawyers may encounter questions of professional conduct that are outside the mainstream, have no obvious answer, and require thought. For example, may a prosecutor accept a guilty plea without revealing to the defense that the prosecution no longer has a triable case because a key witness has become unavailable?²⁸ How should a defense lawyer respond when a client or a client's relative asks the lawyer to take possession of property that may be an instrumentality of a crime (such as the proverbial smoking gun), stolen property, contraband (narcotics or a laptop containing child pornography), or other evidence of a crime (like a second set of books in a tax fraud case)?²⁹ How should defense lawyers and prosecutors alike respond when defense lawyers in the jurisdiction regard their caseloads

22. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

23. *Id.*

24. See generally Klingele, *supra* note 11.

25. MODEL RULES OF PROF'L CONDUCT R. 1.2(d), 3.3(a)(3) (2010).

26. See Flowers, *supra* note 4, at 1021–23.

27. Cf. Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 FORDHAM L. REV. 1429 (2006) (maintaining that in seeking to understand what ambiguous laws require, law-abiding individuals, including lawyers, may draw inferences from what other similarly situated individuals do).

28. See Griffin & Caplow, *supra* note 8, at 858–59.

29. See generally Uphoff, *supra* note 14.

as too crushingly onerous to allow them to serve clients competently? Should the defense lawyers declare themselves unavailable to accept new appointments? Should prosecutors support defense efforts to obtain relief?³⁰

There may be no single right answer to these kinds of questions, but there may be some answers that are better than others, and these are the ones that lawyers should be encouraged to seek. To be sure, some of what a lawyer chooses to do within the bounds of the law does not much matter and may be left to personal taste, values, or philosophy. But much of what a lawyer does in a criminal case matters to the defendant and to the public. The public has an interest in prosecutors and defense lawyers serving their assigned roles not just lawfully, but proficiently, wisely, prudently, and intelligently. Public confidence in the fairness and reliability of the criminal justice process depends on lawyers performing well, not just in a manner consistent with the law. Fairness to individual defendants demands the same. Therefore, even if enforceable law does not dictate how prosecutors should exercise charging discretion in a particular situation or whether defense lawyers should advise clients about confidentiality obligations and associated exceptions, there is a value to developing and articulating standards governing this conduct if a professional consensus can be achieved. In that event, lawyers might be subject to public or professional opprobrium for departing from the professional standards.³¹

But what does it mean to perform well within the bounds of the law? Traditionally, the law and the legal profession have assumed that lawyers can infer what the courts and fellow lawyers expect of them, perhaps through informal means; in other words, there are prevailing professional norms that are not codified but that lawyers are capable of ascertaining. If the lawyer's conduct falls too far below conventional expectations, it may constitute malpractice or constitutionally ineffective assistance. But avoiding incompetence is not enough. Lawyers are expected to aim for the high end, not the bare minimum.

How does a new lawyer come to understand what it means to practice well, and where does an experienced lawyer look for guidance about unusual questions? Perhaps there was a time when professional expectations were relatively uncontested and efficiently transmitted. I recall some years ago chatting with a senior lawyer from Hartford, Connecticut who told me about professional regulation during his early years at the bar. If a new lawyer transgressed informal expectations, a senior lawyer would take him out for a drink—it was invariably a “him”

30. See Lefstein, *supra* note 12, at 974–82.

31. See generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wis. L. REV. 837, 900–04 (discussing the importance of developing specific standards governing prosecutorial decisionmaking derived from broadly relevant principles).

in those days—and kindly explain to him, “that’s not how we do things here.” Perhaps in some professional communities, that is still how it is done. In a prosecutor’s office, public defender’s office, or private law firm, professional expectations may be conveyed through mentoring, training, supervision, policy manuals, and/or other formal or informal means. Judges may also convey professional expectations through informal means. But these methods of conveying ideas of good professional conduct may be inefficient or incomplete.

More significantly, particular understandings within law offices may be contested. In law offices—small, homogenous, closed professional communities—conventional ways of operating may not be the best ways. For example, prosecutors’ offices may take a range of approaches to the exercise of charging discretion. Some may require prosecutors to file charges whenever there is probable cause. Others may forbid prosecutors from bringing charges when the prosecutor has a reasonable doubt. It seems questionable whether each of these approaches, and everything in between, can be regarded as equally appropriate. Likewise, criminal defense lawyers discuss confidentiality with their clients in many different ways. Presumably, some ways are better, some are worse.

There is room for debate about how best to function, because questions of professional conduct often embody tensions between legitimate interests that push in opposite directions, giving rise to conflicting impulses. For example, suppose a prosecutor has a file drawer of witness statements and other documents relating to a pending prosecution. The prosecutor knows that constitutional law and procedural rules require disclosure of only a fraction of the documents and that under the office’s policy, individual prosecutors can decide for themselves whether to disclose more than the law requires. The prosecutor knows that the defendant’s assigned counsel would provide better advice and a more vigorous defense with the benefit of the information in the additional documents but lacks the time and investigative resources to learn the information independently. The prosecutor may not want to disclose more than legally necessary if doing so will make it unnecessarily difficult to convict a defendant who genuinely appears guilty,³² but at the same time, the prosecutor may want to ensure that any conviction derives from a fair criminal justice process, which requires that defense counsel competently perform her assigned role.

Or, to give another example, suppose a criminal defense lawyer has photocopied judicial opinions that she plans to provide to the trial judge at a hearing scheduled for later in the day. She knows that the prosecutor will become antagonistic if copies are not given to him in advance, but

32. See generally Yaroshefsky, *supra* note 17.

she also knows that judges in the jurisdiction do not require such notice to be provided. The defense lawyer may not want to undercut a zealous defense by giving the prosecutor advance notice of her arguments and case authority, but may see a personal benefit, if not a benefit to other clients, in promoting civil relations and minimizing antagonism of opposing counsel by giving over the cases.³³

How should well-intentioned lawyers in these kinds of situations obtain a broader perspective on the best course of professional conduct among the available legal and ethical options? Perhaps it would be ideal for lawyers in these situations to be able to present the relevant facts in confidence to a group of experienced legal professionals representing various perspectives—prosecutors, defense lawyers, judges, and academics from different jurisdictions—and listen to the group hash out the possibilities against the background of writings that reflect all the prior wisdom on the subject. The group would be in a position to consider all of the factual nuances of the concrete situation as well as the particular context in which the situation arises: for example, the particular jurisdiction's law and processes, the particular jurisdiction's culture, and the particular lawyers and judges involved. The problem, of course, is that there are no such broadly constituted collectives of wise legal professionals to give lawyers contemporaneous advice about best practices.³⁴ If there were, it would often be impossible to make use of them because of time pressures and confidentiality obligations.

If such a diverse group of lawyers cannot realistically come together to hear lawyers' problems as they arise, study them, deliberate, and then provide advice about best practices, they *can* come together to consider recurring problems and give general written guidance. That is the objective of those who develop the Criminal Justice Standards for Prosecution and Defense Functions, currently in their third edition and under revision again. The last edition was adopted in 1993 "in an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be," and with the objective to provide "extremely useful standards for consultation by lawyers and judges who want to do 'the right thing' or, as important, to avoid doing 'the wrong thing.'"³⁵

33. See Griffin & Caplow, *supra* note 8, at 865–67, 872–23.

34. Some bar associations have ethics committees that give advice to lawyers about how the ethics rules apply to the lawyers' situations, but these committees generally do not give advice about other law or about how best to exercise judgment and discretion within the context of ethics rules and other law. See Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 747–48 (2002). Even with respect to the application of ethics rules to a particular situation, these committees are not always a realistic source of advice, in part because of confidentiality and timing considerations. See *id.* at 745.

35. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION intro. at xiv (3d ed. 1993).

To be sure, this or any other set of published standards for prosecutors and defense lawyers is less helpful than the guidance that might in theory be given contemporaneously by a broadly constituted group of legal professionals in response to a concrete set of facts, if such a group existed. Standards are invariably general. They cannot capture and account for all the factual nuances. The more broadly they are written, the less they are able to account for context. Different jurisdictions have different laws, processes, and customs; lawyers and judges in different jurisdictions have different kinds of relationships and sets of expectations, and so on. Standards cannot always capture all of the particulars.

On the other hand, standards drafted by a broadly constituted group offer something different from, and additional to, the realistically available alternatives. A group drafting standards can spend more time on a question than can an individual who has to make a decision or give advice about it in a given case. Likewise, the drafters have time to draw more fully upon prior writings. If the drafters are broadly inclusive and seek comments from individuals outside the drafting process, they can take broader perspectives into account than lawyers and their mentors dealing with concrete questions on the spot. Both lawyers trying ultimately to resolve questions for themselves and lawyers giving advice to others may benefit from the collective work product, in the form of standards, produced by others over time and through a process of study, deliberation, notice, and comment. In other words, standards add something important to the mix. The utility of the Criminal Justice Standards for Prosecution and Defense Functions in particular is generally acknowledged. They have been cited on multiple occasions by the U.S. Supreme Court and by lower courts,³⁶ and the comment to Rule 3.8 of the ABA Model Rules of Professional Conduct specifically refers to them as a potential source of professional obligation.³⁷

II. THE UTILITY OF NATIONAL CONVERSATIONS AND SCHOLARSHIP ON DRAFT REVISIONS TO THE PROSECUTION AND DEFENSE FUNCTION STANDARDS

The project that culminated in the companion issues of the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* was occasioned by the revisions to the Criminal Justice Standards for Prosecution and Defense Functions. The pendency of the revision process seemed like a good time to encourage conversations and scholarship regarding professional conduct in criminal cases. As of early 2010, a drafting committee had proposed new versions of the Standards,

36. See Podgor, *supra* note 3, at 1168–73; Marcus, *supra* note 3, at 10–11.

37. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010).

and the Standards Committee, which supervises the production of the entire set of ABA Criminal Justice Standards, was in the process of reviewing and revising these drafts.³⁸ Professor Little, the reporter to the drafting committee, agreed on the utility of inviting academics and practitioners to discuss the revisions at this midpoint, successfully pitched the idea to the Standards Committee, and partnered with me in initiating such discussions.

We viewed law schools, as “neutral turf,” to be the ideal setting for the conversations between prosecutors and defense lawyers, and law professors to be the ideal moderators and organizers because of their training in playing devil’s advocate, asking probing questions and eliciting answers from all sides. Although concerns are sometimes expressed about the “disjunction” between the bar and legal academia,³⁹ there is a large pool of talented academics with a background in criminal justice and/or legal ethics who are happy to collaborate with lawyers and judges. More than a dozen law professors around the country agreed to organize day-long discussions of the revisions to the Standards at their institutions in fall 2010. The dates of the programs, the law schools where they were held, and the law professors who organized them, were as follows:

- September 17, 2010: University of Wisconsin Law School, Ben Kempinen and Cecelia Klingele.
- September 25, 2010: Stetson University College of Law, Roberta Flowers.
- October 8, 2010: Loyola Law School Los Angeles, Laurie Levenson.
- October 8, 2010: Vanderbilt University Law School, Christopher Slobogin.
- October 15, 2010: University of California, Hastings College of the Law, Rory Little.
- October 15, 2010: Roger Williams University School of Law, Peter Margulies.
- October 21, 2010: Benjamin N. Cardozo School of Law, Yeshiva University, Ellen Yaroshefsky.
- October 22, 2010: Boston College Law School, Michael Cassidy.
- October 22, 2010: The University of Oklahoma College of Law, Cheryl Wattley.
- October 29, 2010: Pace Law School, Bennett Gershman and Lissa Griffin.
- November 5, 2010: American University, Washington College of Law, Angela Davis, Cynthia Jones, and Jenny Roberts.

38. Rory K. Little, *The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1114 (2011).

39. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (discussing some of these concerns).

- November 19, 2010: The University of Texas School of Law, Jennifer Laurin.
- November 19, 2010: Washington and Lee University School of Law, James Moliterno.

With one exception,⁴⁰ these were small, invitational, roundtable-style discussions among prosecutors, defense lawyers, judges, and academics, led by academics.⁴¹ The general question was whether the proposed revisions adequately addressed the relevant questions of professional conduct: For example, did the Standards clearly and fairly resolve the problems that prosecutors and defense lawyers may encounter; were the Standards too demanding or too restrictive; and, were they comprehensive or should they address additional aspects of the Prosecution Function and the Defense Function? It would have been impossible, of course, for each group of discussants to survey one or both sets of the proposed Standards in their entirety, or even to address the smaller subset of issues covered by all sixteen solicited papers. Instead, each group generally tackled issues addressed in three or four of the papers. Participants received the relevant papers and draft revisions of the Standards in advance. The authors were invited to attend and present their papers to initiate the discussions. Each organizer identified a “reporter” to prepare notes of what transpired.⁴² The authors of the papers could later draw on the discussions when they revised their papers for publication in the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly*.⁴³ In general, participants regarded the Standards as valuable and appreciated the quality of the work that has gone into revising them.

Although the roundtable discussions and writings that grew out of this project may benefit those engaged in the process of developing and deliberating over the proposed Standards, that was not the principal aim.⁴⁴ The writings collected in the *Hastings Law Journal* and the

40. The exception was the program at the University of California, Hastings College of the Law, entitled “Navigating Prosecutorial Ethics: A Roundtable Discussion on the ABA’s Standards for Criminal Litigation,” which was a public symposium organized by Professor Little, as the reporter to the drafting committee, and co-hosted by the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly*. The panel discussions examined three topics: pretrial discovery of evidence and *Brady* disclosures, media relations, and the practical implications and use of the Standards.

41. The discussion conducted at American University, Washington College of Law, was recorded and is representative of the discussions overall. See *Discussion of Proposed ABA Prosecution and Defense Function Standards*, AM. U. WASH. C.L. (Nov. 5, 2010), http://www.wcl.american.edu/podcast/audio/20101110_WCL_ABA-1.mp3; http://www.wcl.american.edu/podcast/audio/20101110_WCL_ABA-2.mp3.

42. The reporters’ summaries are available from the Author upon request.

43. See, e.g., Wilson, *supra* note 4, at 1232–33 (noting the value of the discussions to the development of her Article). See generally Klingele, *supra* note 11 (describing views of discussants).

44. The roundtable discussions are not formally part of the process of revising and adopting new Standards. Roundtable discussants’ reactions to the Standards may or may not lead to revisions for a

Hastings Constitutional Law Quarterly are meant to benefit those who seek to understand better the complexities of professional conduct questions that implicate the Standards and to address those questions that may not be fully resolved by the Standards. Further, the discussions themselves provided a vehicle and model for bringing together prosecutors, defense lawyers, judges, and academics for civil, honest, well-informed discussions about professional conduct.⁴⁵ Ideally, the project has raised awareness of the Standards within the academic and professional communities and the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* will raise further awareness, thereby assisting the ABA in its efforts to influence and guide professional conduct through the publication and updating of the Standards. Not incidentally, the project has promoted scholarly consideration of the Standards and prosecutors' and defense lawyers' professional conduct generally. In a small way, the project has sought to bridge the gap between the bar and the legal academy to the mutual benefit of each.

III. THE IMPORTANCE OF EXAMINING STANDARDS OF CONDUCT IN CONTEXT

If any single insight emerges from contemplating the proposed Standards, participating in the roundtable discussions, and reading the papers, it is that standards of professional conduct do not exist in isolation. They exist in relation to the law and to broader principles about the lawyer's role. Additionally, each set of Standards exists in relation to the other. That is because expectations for prosecutors depend in part on the expectations for defense lawyers, and vice versa—not in the sense that the Standards for each should be symmetrical, but in the sense that the expectations are often reciprocal. Therefore, the project of developing and articulating professional standards is indeed a big project and an important one.

A. THE RELATIONSHIP BETWEEN MINIMAL LEGAL OBLIGATIONS AND PROFESSIONAL STANDARDS

The ethics rules and other bodies of law governing lawyers are a starting point for professional standards. The law establishes legally enforceable, minimum conduct requirements—what lawyers must or must not do, under penalty of sanction. Standards give lawyers guidance

host of reasons, including the difficulty of achieving consensus among stakeholders, who reasonably may disagree about questions of best professional practice, and the importance of viewing revisions to individual Standards in the broader context of the entire set of ABA Standards.

45. See Yaroshefsky, *supra* note 17, at 1347 ("The roundtable discussions that occurred at law schools throughout the country provided a unique opportunity for many judges, prosecutors, defense lawyers, and academics to gather and consider whether and to what extent these Standards are useful or necessary and what role they should assume in the criminal justice process.").

about how to conduct themselves within the bounds of the law. Sometimes law and standards are coextensive: the standard may say, in effect, “comply with the law and nothing more,”⁴⁶ or, less often, the law may say, in effect, “you must act consistently with the standard.”⁴⁷ For the most part, however, they do different work. Even so, looking at them together yields insights into both the law and the standards.

Looking at law and standards together may yield insights into how either or both should develop. The ideal balance between law and standards is not always clear. To some extent, lawyers’ professional conduct is, and should be, dictated by law. To a large extent, lawyers and their offices must be allowed to exercise discretion and judgment with the guidance of uncodified expectations, unenforceable standards, and other professional writings. A question for those who establish ethics rules and other law governing lawyers’ professional conduct is, “when should a course of conduct be dictated by law, and when should lawyers be exempt from legal dictates?” If one is satisfied with the content and clarity of standards, and confident that lawyers will act consistently with them, one will be more inclined to broaden lawyers’ discretion. Looking at the law and standards in conjunction may sometimes contribute to answering this question.

For example, consider the question addressed by Professor Moliterno: What should a defense lawyer do when she learns confidentially, in the course of representing a client, that someone else has been wrongly convicted?⁴⁸ Two state ethics codes expressly allow lawyers to disclose client confidences in this situation, but other state ethics codes do not and might be read to forbid lawyers from disclosing client confidences in this situation without the client’s consent.⁴⁹ Recently, the leadership of the ABA Criminal Justice Section debated whether to seek revisions to the ABA Model Rules of Professional Conduct on this subject but ultimately decided not to do so. As the discussion made clear, there are many aspects of and complexities to this debate. The extent to which the addition of an exception to the confidentiality duty will chill clients’ disclosures is an important, but empirically unresolvable, question. Another important question, however, relates to standards and their influence: Can a standard sufficiently identify the rare situations when it would be appropriate to disclose client confidences in order to rectify a wrongful conviction, and

46. For example, the current Standards on public statements essentially restate the prevailing ethics rule. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.4 (3d ed. 1993); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.4 (3d ed. 1993); see also MODEL RULES OF PROF’L CONDUCT R. 3.6(a), 3.8(f) (2010).

47. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

48. See generally Moliterno, *supra* note 13.

49. *Id.* at 821–23.

would lawyers abide by the standard? If agreement can be reached on written standards that capture these rare situations, and one is confident that the standards will have influence, then one might be more inclined to leave the decision to lawyers' discretion. Otherwise, one might be more inclined toward an enforceable rule that, in order to prevent abuses of discretion, categorically forbids disclosure.⁵⁰

Standards have the potential to influence the development of the law, and an awareness of that possibility may be a consideration in how the standards themselves are developed. The Supreme Court's recent decision in *Padilla v. Kentucky* illustrates the role that standards may play in helping determine whether defense counsel's conduct falls below a standard of reasonableness, which is one element of constitutionally ineffective assistance of counsel.⁵¹ But the influence of professional standards can take other forms. Consider, for example, legal questions associated with conflicts of interest in the criminal context, including questions about when courts should disqualify defense lawyers or prosecutors, when courts should overturn convictions based on defense lawyers' alleged conflicts of interest, and when lawyers should be personally sanctioned for failing to decline or withdraw from a representation, obtain client consent, or otherwise to respond properly to a conflict of interest. These questions are not resolved by statute so much as by case law developed under the Sixth Amendment right to counsel or by court-adopted ethics rules. As Professor Levenson's contribution reflects, there are myriad questions relevant to determining how prosecutors, defense lawyers, and courts should deal with conflicts⁵²—almost certainly too many questions to resolve in the Criminal Justice Standards for Prosecution and Defense Functions. A project devoted exclusively to expanding the Standards relating to conflicts of interest in the criminal context might be worthwhile. To the extent that a consensus could be developed around more detailed Standards that fill the gaps in case law, it is likely that the Standards would influence courts' development of subsequent case law.⁵³

Similarly, the Standard on peremptory challenges might not only guide lawyers on how to exercise discretion within the bounds of the law, but also influence what direction the law takes. As Professor Podgor describes, the Standards Committee revising the Criminal Justice Standards for Prosecution and Defense Functions has wrestled with whether prosecutors and/or defense lawyers should be advised against

50. See generally Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006).

51. 130 S. Ct. at 1482.

52. See generally Levenson, *supra* note 10.

53. See, e.g., *United States v. Flanagan*, 679 F.2d 1072, 1075 n.2 (3d Cir. 1982).

striking jurors based on sexual orientation,⁵⁴ even if it may be permissible under current law to use a challenge on this basis.⁵⁵ The ultimate outcome of this debate will likely determine what position the ABA may take as *amicus curiae* if the constitutional question comes before the Supreme Court. In the meantime, the debate may influence how state courts and lower federal courts view the constitutional question.

Standards on many subjects cannot be developed meaningfully without reference to the relevant law. For example, the Standards on conflicts of interest,⁵⁶ peremptory challenges,⁵⁷ prosecutorial disclosure,⁵⁸ and summations⁵⁹ are closely intertwined with legal standards governing the same general conduct. The law that establishes the bounds within which lawyers may act may be too restrictive, too permissive, or too ambiguous. The process of discussing, developing, and studying standards such as the Criminal Justice Standards for Prosecution and Defense Functions may reveal when the law is incomplete or deficient.

Consider, for example, defense lawyers' receipt of physical items or documents that may be evidence, contraband, or fruits or instrumentalities of a crime. As Professor Uphoff discusses, the intuition underlying the relevant Standard is that while lawyers should not destroy these items, neither should they produce these items to law enforcement authorities in a manner that implicates the client if it is legally possible to avoid doing so.⁶⁰ However, the relevant case law, derived from the criminal law on obstruction of justice and related offenses, does not easily accommodate the kind of conduct that might be considered optimal.⁶¹ The cases potentially require lawyers to implicate their clients in situations where, given the choice, lawyers ideally would refrain from doing so.⁶² Studying how the Standards apply in this context may lead to the conclusion that the law is potentially too demanding and ought to be reformed or clarified. On the other hand, a discussion of the Standards governing witness preparation may lead some to the opposite conclusion: namely, that some interviewing and preparation techniques should be

54. See Podgor, *supra* note 3, at 1173–75.

55. Compare *People v. Garcia*, 92 Cal. Rptr. 2d 339, 347–48 (Ct. App. 2000) (finding that sexual orientation is a protected class for jury selection purposes), with *United States v. Ehrmann*, 421 F.3d 774, 782 (8th Cir. 2005) (expressing doubt that sexual orientation is a protected class for jury selection purposes).

56. See generally Levenson, *supra* note 10.

57. See Podgor, *supra* note 3, at 1173–75.

58. See generally Yaroshefsky, *supra* note 17.

59. See generally Medwed, *supra* note 7.

60. See Uphoff, *supra* note 14, at 1185–97.

61. See *id.* at 1188–90.

62. See *id.* at 189–90.

placed off limits by ethics rules or other law and not left to lawyers' discretion because of their excessive potential to lead to false testimony.⁶³

B. THE RELATIONSHIP BETWEEN PROFESSIONAL STANDARDS AND PROFESSIONAL ROLES

The articulation of professional standards for how lawyers should conduct themselves within the bounds of the law logically begins not only with the relevant law but with an understanding of lawyers' roles. In their contribution, Professors Griffin and Caplow point out that the draft revisions to the Prosecution Function Standards more fully explicate the prosecutor's role than does the current edition.⁶⁴ They show that the differences may be significant for how prosecutors approach questions of civility, cooperation, and candor in their relationship with defense lawyers.⁶⁵

Developing a consensus regarding the professional role of lawyers in the criminal context may not be easy, but it is essential to establishing the legitimacy of proposed standards. Consider a question explored by Professor Lefstein: whether prosecutors should seek to remedy deficiencies in the delivery of indigent defense services occasioned by such problems as excessive caseloads and resource limitations.⁶⁶ Based on the prosecutors' function not only to seek justice but also to seek improvements to the administration of criminal justice, Professor Lefstein advocates a prosecutorial obligation to refrain from exploiting such weaknesses.⁶⁷ The antecedent question, of course, is whether the role of a prosecutor necessarily includes a law reform function, which may be an unaccustomed one for many in that position.

Professor Kempinen's article on problem-solving courts⁶⁸ illustrates the importance of focusing on lawyers' role from the defense side. As he describes, problem-solving courts may call on defense lawyers to serve roles other than the traditional one of zealous advocate for a client.⁶⁹ Defense lawyers may be expected to play a collaborative role that is inconsistent with that of carrying out the client's objectives and preserving the client's confidences. The Defense Function Standards do not elaborate on a defense lawyer's role in the context of drug courts, mental health courts, community courts, and the like. Those who may eventually develop specific professional standards for defense lawyers representing clients in problem-solving courts will have to begin by

63. See generally Flowers, *supra* note 4.

64. Griffin & Caplow, *supra* note 8, at 850–53.

65. *Id.*

66. See generally Lefstein, *supra* note 12.

67. *Id.* at 974–79.

68. Kempinen, *supra* note 15.

69. *Id.* at 1353–54.

grappling with the question of whether, with or without a client's consent, defense lawyers functioning in these settings can depart from the traditional adversarial role.

C. THE RELATIONSHIP BETWEEN PROSECUTION AND DEFENSE FUNCTION STANDARDS

The committee responsible for revising the Criminal Justice Standards for Prosecution and Defense Functions has worked on both sets of Standards simultaneously, rather than in succession. This approach reflects the recognition that neither prosecution nor defense conduct should be viewed in isolation. Rather, they are best considered in relation with each other.

This is not to say that prosecutor and defense lawyer standards regarding comparable conduct should be symmetrical. One might start with the intuition that, because prosecutors and defense lawyers are counterparts in the same adversary process and encounter similar questions, the relevant standards ought to be the same. But the intuition will not always hold up under scrutiny, because prosecutors and defense lawyers have very different roles—prosecutors as “ministers of justice,”⁷⁰ first and foremost, and defense lawyers as zealous advocates on behalf of individual clients.

Consider, for example, the question raised earlier of whether a lawyer should advise a potential witness about the background law, knowing that doing so may, if only unintentionally, influence the witness to recall events in an untruthful, self-serving manner. One might initially assume that this conduct should be either permitted or forbidden for prosecutors and defense lawyers alike. However, as Professor Wilson discusses, “The proposed Defense Standard tacitly recognizes that prosecutors and defense lawyers play different roles in the criminal justice process and that different standards and expectations are, therefore, appropriate. The prosecutor’s goal should be justice; defense counsel’s goal is freedom for the accused.”⁷¹ The distinction might be developed further. Compare the defense lawyer advising a defendant-client about the law applicable to her case, with a prosecutor advising a police officer who is being prepared to testify in a suppression hearing about what facts will and will not support the admission of evidence. The defense lawyer has an obligation to give advice to enable the client to make informed decisions;⁷² the prosecutor has no comparable obligation to advise police officers and other government witnesses. In general,

70. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); *see also* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607 (1999).

71. Wilson, *supra* note 4, at 117.

72. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2010).

defense lawyers have a responsibility ultimately to accept their clients' factual accounts, and refusing to do so may undermine the client trust that is presumed to be essential to an effective lawyer-client relationship. Prosecutors, on the other hand, have a responsibility to ensure a fair process, which suggests an obligation to promote the veracity of their witnesses' testimony, rather than to employ interviewing and preparation techniques that are likely to elicit or encourage false accounts. Similar distinctions might be drawn when it comes to other comparable conduct, such as communications with the press⁷³ or summations.⁷⁴

At the same time, it seems important to view prosecution and defense conduct in tandem, because how one should behave will often depend in part on how the other behaves. This is true in many areas. Should defense lawyers turn over inculpatory physical evidence? One may be more inclined to say "yes" if there is an understanding that the prosecutor will not use that act against the defendant. Should prosecutors produce significantly more evidence and information to the defense before trial than the law requires? One may be more inclined to say "yes" if there is an understanding that defense lawyers will protect against the information being used to intimidate or improperly influence witnesses. Should defense lawyers disclose client confidences to exonerate a wrongly convicted third party? One may be more inclined to say "no" if the prosecutor is likely to use the information against the lawyer's client and cannot be counted on to investigate diligently to determine whether there was a miscarriage of justice. Should prosecutors ask courts to disqualify defense lawyers who appear to have conflicts of interest? One may be more inclined to say "no" if defense lawyers can be trusted to take their ethical obligations under the conflict rules seriously. In the end, although the professional expectations relating to prosecutors and defense lawyers should not necessarily be symmetrical, they should be reciprocal in many respects.

CONCLUSION

The two issues of the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* are the product of collaboration. The leadership and staff of the ABA Criminal Justice Section, and the

73. Professor Taslitz's contribution suggests various reasons why the expectations for prosecutors and defense lawyers should not necessarily be the same, including that prosecutors' public statements are likely to have a greater impact on prospective jurors and that the justifications for their communications with the press generally differ. Taslitz, *supra* note 5, at 1292, 1308–10.

74. See Medwed, *supra* note 7, at 917 ("The standards [on summation] are essentially identical for the two sides. This approach is admirable in many respects: A blatant stab at equal treatment for all advocates in the criminal trial process. Yet this balanced approach ignores the reality that summation misconduct varies considerably for prosecutors and defense lawyers given their different systemic roles and, just as important, differences in how jurors perceive those roles.").

members of the Standards Committee, were instrumental in supporting the idea of a national conversation on the revisions to the Criminal Justice Standards for Prosecution and Defense Functions. Most especially, invaluable assistance was provided by Professor Rory Little, the reporter to the drafting committee; by Judge Marty Marcus, who chairs the Standards Committee; by Jack Hanna, executive director of the ABA Criminal Justice Section, and his staff; and, by Ron Goldstock, an officer of the ABA Criminal Justice Section who has long participated in the Standards process. Every one of the thirteen law schools listed above⁷⁵ and their faculty, who organized discussions of the Standards, and all those who participated in the discussions as discussants, moderators, and reporters, provided a model for civil and productive professional discourse, interaction, and collaboration. Through their writings and participation in last fall's discussions, the sixteen authors represented in the two Hastings publications, some of whom served double duty as organizers of discussions, made indispensable contributions to those conversations and to the ongoing scholarly debate. Developing better understandings of professional practice is not a solitary pursuit. It takes many. Many thanks to all!

75. See discussion *supra* pp. 1101-02.